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Defenders of Wildlife v. EPA: Reconciling the Endangered Species Act and Clean Water Act or Further Confusing the Statutory Overlap?

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DEFENDERS OF WILDLIFE v. EPA: RECONCILING THE ENDANGERED SPECIES ACT AND CLEAN WATER ACT OR FURTHER CONFUSING THE STATUTORY OVERLAP?

I. INTRODUCTION

Seeking to address environmental concerns regarding the quality of the nation's waterways, Congress enacted the Clean Water Act (CWA) in 1972 to eliminate the release of toxic pollutants and regulate the level of pollution in fishable and navigable waters.[1] The CWA provided for the establishment of the National Pollutant Discharge Elimination System (NPDES), which fulfills the CWA's objectives concerning the regulation of water pollution.[2] The Environmental Protection Agency (EPA) is authorized to enforce the provisions of the CWA and oversee the NPDES.[3] Under the terms of the CWA, a state may apply to the EPA for the authority to administer its own permit program for the discharge of pollutants into navigable waters.[4] Upon receiving the state's application, the EPA Administrator "shall approve each submitted program" if the state demonstrates compliance with the criteria enumerated in the statute.[5]

In *Defenders of Wildlife v. EPA* (*Defenders of Wildlife*),[6] the petitioners—Defenders of Wildlife, the Center for Biological Diversity and an Arizona citizen—claimed that the EPA violated its duty under the Endangered Species Act (ESA) when it approved the State of Arizona's pollution permit application.[7] Specifically, petitioners alleged that the EPA did not satisfactorily take into account

1. *See* Elizabeth Rosan, *EPA's Approach to Endangered Species Protection in State Clean Water Act Programs*, 30 ENVTL. L. 447, 452 (2000) (explaining Congress's purpose in enacting CWA).

2. *See id.* (describing CWA's systematic structure).

3. *See id.* at 453 (explaining administrative hierarchy under CWA).

4. *See* 33 U.S.C. § 1342(b) (2000) (setting forth process and requirements necessary for application and approval of state authority to administer pollution permit program).

5. *See id.* (describing guidelines governing EPA Administrator's approval of state application).

6. 420 F.3d 946 (9th Cir. 2005).

7. *See id.* at 954-55 (describing petitioners' request for review of EPA transfer decision). The court additionally noted that three separate parties intervened in support of the EPA's decision, including the National Association of Home Builders, the Arizona Chamber of Commerce and Arizona. *See id.* at 955. These parties agreed with the EPA's grant of Arizona's transfer application, but were dissatisfied with certain aspects of the EPA's administrative practices and reasoning. *See id.*

the effect of the permitting authority transfer on endangered species and their critical habitats, as the ESA required.[8] Petitioners claimed that the EPA's decision to approve Arizona's transfer application was arbitrary and capricious because the EPA failed to consider all the necessary and relevant information required for approval.[9]

In its ruling, the Ninth Circuit addressed whether the EPA possessed the statutory authority under both the CWA and the ESA to consider effects on endangered species when reviewing and deciding state pollution permit applications.[10] After considering the language of the ESA, congressional intent and relevant case law, the Ninth Circuit held that the EPA had the authority to consider possible harm to endangered species in making its transfer decision.[11] The court found, however, that the EPA's failure to analyze the relevant information and its reliance on a deficient Biological Opinion resulted in an arbitrary and capricious decision to approve Arizona's application.[12]

This Note asserts that the Ninth Circuit's decision to vacate the EPA's approval of Arizona's pollution permitting program improperly extended the EPA's authority under the CWA and ESA.[13] Part II sets forth the facts surrounding the case.[14] Part III explains the pertinent statutory and regulatory provisions of the CWA and ESA and examines significant United States Supreme Court and circuit court decisions interpreting these statutes.[15] Part IV discusses the Ninth Circuit's analysis of the EPA's transfer decision and agency

8. *See id.* (noting petitioners' specific objections to transfer decision). For a further discussion of CWA's provision permitting states to apply for transfer of pollution permitting authority from the EPA, see *infra* notes 40-48 and accompanying text.

9. *See id.* (describing petitioners' claim concerning substance of EPA's transfer decision).

10. *See id.* at 950 (explaining background of case and disagreement over scope of EPA's decision-making authority).

11. *See Defenders of Wildlife*, 420 F.3d at 971 (finding transfer decision constituted agency action that triggered section 7(a)(2) consultation obligations).

12. *See id.* at 977 (noting EPA and Biological Opinion's failure to consider adequately transfer's indirect effects on endangered species). For a further discussion of the Ninth Circuit's analysis of the EPA's decision under the arbitrary and capricious standard, see *infra* notes 93-100 and accompanying text.

13. *See id.* at 979 (Thompson, J., dissenting) (finding majority opinion incorrectly interpreted ESA expansively).

14. For a discussion of the factual background in *Defenders of Wildlife*, see *infra* notes 19-39 and accompanying text.

15. For a discussion of the pertinent statutes, relevant regulatory provisions and significant cases addressing the issues covered in *Defenders of Wildlife*, see *infra* notes 40-92 and accompanying text.

obligations under the CWA and ESA.[16] Part V analyzes the court's interpretation of the statutes and its position opposing the conclusions of circuit courts addressing the same issue.[17] Part VI discusses the impact the Ninth Circuit's opinion will have on future state pollution permitting programs and on the adjudication of these environmental issues in subsequent cases.[18]

II. FACTS

The dispute in *Defenders of Wildlife* focused on the EPA's decision to approve Arizona's application for the transfer of pollution permitting authority from the EPA to the state.[19] The State of Arizona first submitted its pollution permit program application to the EPA on January 14, 2002.[20] After receiving this request, the EPA determined that its consideration of Arizona's CWA permitting program application constituted a federal action that invoked the requisite compliance with ESA section 7(a)(2).[21] ESA section 7(a)(2) requires the EPA to make certain that any action it approves, funds or undertakes will not present a likely threat of harm to endangered species or their critical habitats.[22] The EPA can satisfy this requirement through consultation with the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS).[23]

16. For a discussion of the Ninth Circuit's analysis of the issues in *Defenders of Wildlife*, see *infra* notes 93-134 and accompanying text.

17. For an analysis of the Ninth Circuit's reasoning in *Defenders of Wildlife*, see *infra* notes 135-61 and accompanying text.

18. For a discussion of the potential implications of the Ninth Circuit's decision in *Defenders of Wildlife*, see *infra* notes 162-72 and accompanying text.

19. *See Defenders of Wildlife v. EPA*, 420 F.3d 946, 950 (9th Cir. 2005) (describing EPA's authorization to consider impact of CWA decisions on endangered species as principal issue in case).

20. *See id.* at 952 (setting forth chronology of events involved in case). *See also* Application to Administer the National Pollutant Discharge Elimination System (NPDES) Program, 67 Fed. Reg. 49,916, 49,917 (Aug. 1, 2002) (stating when EPA received application materials).

21. *See* Application to Administer the NPDES Program, 67 Fed. Reg. 49,917 (explaining section 7(a)(2) of ESA imposes legal obligation "separate and distinct" from EPA's authority under CWA).

22. *See* 16 U.S.C. § 1536(a)(2) (2000) (prescribing agency duties to protect endangered species). The statute provides:

> [e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . .

See id.

23. *See* Rosan, *supra* note 1, at 459 (explaining ESA section 7 statutory requirements for protection of endangered species).

After receiving Arizona's application, the EPA stated that it would not issue a final decision until the conclusion of the consultation process.[24]

While completing the consultation process, Arizona's FWS office voiced significant concerns regarding the proposed transfer.[25] The FWS noted that the ESA section 7 consultation requirement resulted in the implementation of "mitigating measures" to assist in preserving species' habitats.[26] The FWS expressed concern that, in the absence of compulsory consultation, Arizona would grant permits without such measures.[27] Prior to issuing the Biological Opinion summarizing its analysis of the impacts of the transfer on endangered species and critical habitats, the FWS office staff concluded that the "loss of protections to species resulting from the section 7 process" could cause potentially harmful effects and therefore must be considered in the conclusive Biological Opinion.[28] The EPA responded that it could not ground its transfer decision on that basis because it lacked the legal authority to consider the "non-water-quality-related impacts" pertaining to permitting programs.[29]

In response to this difference of opinion, the EPA and FWS staff documented each agency's position in an "Interagency Evaluation Document," which transferred oversight authority of the Biological Opinion's completion to certain directors and administrators of the EPA, FWS and NMFS.[30] Following a consulta-

24. *See* Application to Administer the NPDES Program, 67 Fed. Reg. 49,917 (announcing Arizona's transfer application and process for application review).

25. *See Defenders of Wildlife*, 420 F.3d at 952 (discussing FWS consultation prior to EPA approval of Arizona's pollution permitting transfer application).

26. *See id.* (observing benefits arising from mandatory section 7 consultations concerning previous federally issued pollution permits).

27. *See id.* (noting lack of mitigating measures could produce harmful effects on listed endangered species, including southwestern willow flycatcher, Pima pineapple cactus, Huachuca water umbel and cactus ferruginous pygmy owl).

28. *See id.* at 951-52 (citing 50 C.F.R. pt. 402.14(h) (2005)) (describing Biological Opinion as including summary of information forming basis of opinion, comprehensive discussion of proposed action's effects on endangered species or critical habitats, and FWS's opinion concerning whether proposed action would likely endanger survival of listed species or cause destruction or harmful alteration of critical habitats).

29. *See id.* at 952-53 (explaining scope of EPA's authority regarding transfer decisions).

30. *See Defenders of Wildlife*, 420 F.3d at 953 (noting that Memorandum of Agreement between EPA, FWS and NMFS provides that "Interagency Evaluation Document" shifts control over Biological Opinion to Deputy Assistant Administrator at EPA, Director of FWS and Director of NMFS). *See also* Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination

tion among the three agencies, the FWS Field Supervisor issued a Biological Opinion recommending approval of the transfer of pollution permitting administration to the Arizona state government.[31] After this transfer, Arizona could voluntarily engage in the consultation process prior to issuing pollution permits, but the EPA could not direct the state to do so.[32]

Addressing the issue of decreased species protection, the Biological Opinion concluded that the loss of the section 7 consultation benefit resulted not from the EPA's decision to approve the transfer, but instead "reflect[ed] Congress'[s] decision" to give states the explicit authority to administer permitting programs as long as the state's program complied with CWA requirements.[33] The Biological Opinion further concluded that "EPA's [Clean Water Act] - mandated approval of the program has only an attenuated causal link to the reduction in Federal [Endangered Species Act] conservation responsibilities."[34] The Biological Opinion also offered an alternative to the lack of causation analysis, suggesting that other federal and state laws provided endangered species sufficient protection, and consequently, the transfer would not likely jeopardize these endangered species or their critical habitats.[35]

On December 5, 2002, the EPA approved Arizona's application for transfer of pollution permitting authority.[36] The EPA issued a notice on December 30, 2002, stating that the Arizona Department of Environmental Quality (ADEQ) would administer the state's pollution permit program, replacing the NPDES program previously

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Under the Clean Water Act and Endangered Species Act, 66 Fed. Reg. 11,202, 11,208-09 (Feb. 22, 2001) (explaining interagency elevation process).

31. *See Defenders of Wildlife*, 420 F.3d at 953 (noting Biological Opinion acknowledged transfer would effectively eliminate federal agency power to consult developers regarding possible effects of pollution permits on endangered species).

32. *See id.* (discussing practical effect of EPA's transfer decision).

33. *See id.* (highlighting Biological Opinion's conclusion explaining reason for lack of consultation benefit as result of congressional intent).

34. *See id.* at 954 (referencing Biological Opinion's lack of causation analysis).

35. *See id.* (describing Biological Opinion's emphasis on alternative methods of species protection, including ESA section 9, which prohibits "taking" of endangered species). Furthermore, apart from the Biological Opinion's data and conclusions, an Arizona Game and Fish Department official noted that they had "worked cooperatively with ADEQ [Arizona Department of Environmental Quality]" during assessments of past water pollution permit applications. *See id.* Additionally, FWS staff recommended the establishment of a memorandum of understanding with ADEQ or the Arizona State Lands Department to ensure consultation before permit issuance, but no such document was ever produced and signed. *See id.*

36. *See* Approval of Application by Arizona to Administer the National Pollution Discharge Elimination System (NPDES) Program, 67 Fed. Reg. 79,629 (Dec. 30, 2002) (announcing EPA's approval of Arizona's transfer application).

operated and managed by the EPA.[37] The notice additionally stated that the EPA would continue to maintain "oversight and enforcement authority" after the transfer of permit issuing authority.[38] In *Defenders of Wildlife*, petitioners challenged the EPA's approval of this state-controlled permit program and filed a petition with the Ninth Circuit to review the EPA's transfer decision.[39]

III. BACKGROUND

A. Relationship Between CWA and ESA

Congress passed the CWA and ESA to satisfy similar environmental protection objectives.[40] Enacted in 1972, the CWA aims to improve the quality of the nation's waterways and to eliminate the discharge of harmful pollutants into these waters.[41] In 1973, Congress enacted the ESA for the purpose of protecting and promoting the viability of endangered species.[42] Although the goals of the two statutes appear complementary, their interplay does not always produce clear results.[43] The issues in *Defenders of Wildlife* center on the CWA provisions that provide the EPA with the authority to transfer pollution permitting control to individual states and the ESA requirements that instruct federal agencies to ensure that agency actions do not harm the continued existence or critical habitats of endangered species.[44]

37. *See id.* (noting that EPA's decision to approve Arizona's transfer application included examination and consideration of comments and issues arising from public comment period).

38. *See id.* (describing EPA action under CWA section 1342(b)).

39. *See Defenders of Wildlife*, 420 F.3d at 955 (setting forth procedural history of case). Petitioners also filed an Endangered Species Act and Administrative Procedure Act lawsuit in Arizona district court, which included a claim that the Biological Opinion used to support the EPA's decision did not conform to ESA standards. *See id.* The district court found that the Ninth Circuit held exclusive jurisdiction over review of that claim and ordered the claim severed from the action and transferred to the Ninth Circuit for consolidation with petitioners' other claim challenging the transfer decision. *See id.*

40. *See* Melanie J. Rowland, *The Clean Water Act and ESA Consultation in the Northwest*, SK056 A.L.I.-A.B.A. 197, 199 (Apr. 6-8, 2005) (discussing compatibility of ESA and CWA).

41. *See* 33 U.S.C. § 1251(a) (2000) (declaring congressional purpose of CWA). The CWA's purpose is "[r]estoration and maintenance of chemical, physical and biological integrity of the Nation's waters." *See id.*

42. *See* 16 U.S.C. § 1531(b) (2000) (stating purpose of ESA as providing measures to ensure conservation of endangered and threatened species).

43. *See* Rowland, *supra* note 40, at 199 (explaining that interplay is complicated due in part to differences in standards, regulations and procedures).

44. *See Defenders of Wildlife*, 420 F.3d at 950-51 (explaining relevant sections of CWA and ESA).

The CWA gives the EPA Administrator the authority to issue permits to discharge pollutants into the nation's navigable waters.[45] CWA section 1342(b) sets forth the provisions and procedures governing the transfer of permitting authority to the states.[46] The statute provides that the EPA Administrator "shall approve" a state's transfer application "unless he determines that adequate authority does not exist" based on the consideration of nine enumerated criteria.[47] After the EPA transfers permitting authority to the state, the EPA Administrator oversees the state's administration of its permitting program.[48]

The argument concerning the intersection of the CWA and ESA in *Defenders of Wildlife* centers on ESA section 7(a)(2), which requires federal agencies to consult with the Secretary of the Interior to ensure that agency actions are not "likely to jeopardize the continued existence of an endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."[49] The regulatory provisions established for ESA enforcement provide that section 7 requirements "apply to all actions in which there is discretionary Federal involvement or con-

45. *See* 33 U.S.C. § 1342(a)(1) (outlining EPA Administrator's permit issuing authority under statute).

46. *See id.* § 1342(b) (outlining state permit program approval process).

47. *See id.* (listing nine requirements for approval of state permit programs). The nine enumerated criteria include authority to: (1) issue permits that comply with relevant statutory sections, do not exceed five years and are capable of termination or modification for cause; (2) inspect, monitor, enter and require reports; (3) guarantee that issued permits will be made public; (4) make certain that EPA Administrator receives notification and copies of permit applications; (5) insure that other states whose waters may be impacted by issuing state's permits may be notified and given opportunity to submit written recommendations; (6) guarantee that no permits will be issued if the Secretary of the Army, in consultation with the Secretary of the department where the Coast Guard is operating, determines that the permit would interfere with water navigation; (7) decrease violations of permits or permit program through imposition of penalties and other methods of enforcement; (8) insure that a pollution permit for a publicly owned treatment works contains provisions requiring the identification of character and volume of pollutants; and (9) guarantee that industrial users of a publicly owned treatment works will act in accordance with the requirements of the pertinent CWA sections. *See id.*

48. *See id.* § 1342(c) (setting forth procedure following EPA approval of state applications). The Administrator's role as overseer includes authority to withdraw approval of the state program. *See id.* If the Administrator holds a public hearing and finds the "State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program." *See id.* § 1342(c)(3).

49. *See* 16 U.S.C. § 1536(a)(2) (outlining federal agency duty to protect endangered species under ESA).

trol."[50] Significantly, the ESA's language specifically names only federal agencies as subject to the section 7 consultation requirement.[51] Thus, the ESA does not require state governments to conduct the consultation process prior to taking actions that might affect endangered species or their critical habitats.[52]

B. United States Supreme Court Precedent Interpreting the ESA—*Tennessee Valley Authority v. Hill*

In 1978, five years after the ESA's enactment, the United States Supreme Court in *Tennessee Valley Authority v. Hill* (*Tennessee Valley*)[53] heralded the statute as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[54] The Court's interpretation of the section 7 consultation requirement provides guidance for agency obligations with respect to the preservation of endangered species.[55] In interpreting the language of section 7 and its delegation of species preservation responsibility to agencies, the Court emphasized that the ESA's plain meaning "affirmatively command[s]" federal agencies to actively ensure that agency actions do not jeopardize the lives or critical habitats of endangered species.[56] The Court's examination of the ESA's legislative history also supported the interpretation that Congress intended agencies "to afford first priority to the declared national policy of saving endangered species."[57]

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50. *See* 50 C.F.R. pt. 402.03 (2005) (defining applicability of ESA section 7 requirements).

51. *See Defenders of Wildlife v. EPA*, 420 F.3d 946, 951 (9th Cir. 2005) (noting scope of ESA's section 7 requirements). *See also* Rosan, *supra* note 1, at 459 (highlighting that ESA consultation requirement applies only to federal actions permitting discretionary involvement or control).

52. *See Defenders of Wildlife*, 420 F.3d at 951 (identifying ESA's duty to consult, as applicable, with federal agency decisions but not state decisions).

53. 437 U.S. 153 (1978).

54. *See id.* at 180 (discussing endangered species protection under ESA).

55. *See id.* at 173 (discussing ESA's express delegation of consultation duty to federal agencies).

56. *See id.* (emphasizing plain language of statute requires agencies to evaluate impacts of agency actions on endangered species).

57. *See id.* at 181, 185 (finding Congress's intentional abandonment of prior draft language requiring agencies to preserve endangered species only as practicable and consistent with agencies' purposes indicated clear intent to make species preservation high priority).

C. Circuit Court Split Concerning the Scope of ESA Authority When Agencies Act Pursuant to Other Statutes

Since the Supreme Court's *Tennessee Valley* decision, circuit courts have split over whether ESA section 7's species preservation provisions apply when the EPA or other federal agencies are exercising authority and acting pursuant to another statute.[58] The First Circuit in *Conservation Law Foundation of New England v. Andrus* (*Conservation Law Foundation*)[59] and the Eighth Circuit in *Defenders of Wildlife v. Administrator* (*Defenders of Wildlife v. Administrator*)[60] both found that federal agencies must comply with ESA requirements even when acting under the authority of a separate statute.[61] By contrast, recent decisions have articulated a more restrictive view of the scope of a federal agency's authority.[62] The Fifth Circuit in *American Forest & Paper Ass'n v. EPA* (*American Forest*)[63] and the District of Columbia Circuit in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission* (*Platte River*)[64] each held that the ESA did not enlarge an agency's authority if another statute constrained that authority.[65]

1. *Broad View of Agency Authority Under ESA*

In *Conservation Law Foundation*, the First Circuit considered whether the Secretary of the Interior's plan to lease tracts of land for oil and gas exploration, development and production violated ESA section 7(d).[66] This section prohibits agency activities involving "any irreversible or irretrievable commitment of resources" that prevent the development of alternative endangered species protec-

58. *See Defenders of Wildlife*, 420 F.3d 946, 969-70 (9th Cir. 2005) (acknowledging circuit split over scope of authority ESA provides).

59. 623 F.2d 712 (1st Cir. 1979).

60. 882 F.2d 1294 (8th Cir. 1989).

61. *See Conservation Law Foundation*, 623 F.2d at 715 (holding ESA requirements continued to apply when Secretary of Interior acted under Outer Continental Shelf Lands Act authority); *see also Defenders of Wildlife v. Administrator*, 882 F.2d at 1299 (finding EPA must comply with ESA when acting under Federal Insecticide, Fungicide, and Rodenticide Act).

62. For a discussion of other circuit courts' narrow construction of the EPA's ESA authority when acting in conjunction with authority provided by a separate statute, see *infra* notes 63-65 and accompanying text.

63. 137 F.3d 291 (5th Cir. 1998).

64. 962 F.2d 27 (D.C. Cir. 1992).

65. *See American Forest*, 137 F.3d at 294 (holding EPA could not exercise much discretion when deciding whether to approve state permitting program applications); *see also Platte River*, 962 F.2d at 34 (finding ESA did not expand authority established by agency's enabling act).

66. *See Conservation Law Foundation*, 623 F.2d at 714 (explaining claim asserted in case).

tion measures.[67] The Foundation asserted that once the defendant sold the leases, the Secretary could only cancel them through compliance with the standards of the Outer Continental Shelf Lands Act (OCSLA), which are less comprehensive and less strict than those of the ESA.[68] The Foundation claimed that the loss of the more stringent ESA requirements would result in lease sales that committed valuable resources to projects that threatened endangered species.[69] The First Circuit found that addressing the issue was unnecessary because the standards of the two statutes were complementary, and the ESA preservation requirements remained in place and applied to the Secretary's actions following the lease sales.[70] Thus, before negotiating a lease under authority of the OCSLA, the Secretary must ensure that the terms of the lease would permit ESA compliance and not result in harm to endangered species.[71]

The Eighth Circuit reached a similar decision in *Defenders of Wildlife v. Administrator*.[72] In that case, environmental interest groups brought an action against the EPA Administrator and the Secretary of the Interior seeking to ban the use of pesticides containing strychnine on land surfaces.[73] Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), companies must register pesticides with the EPA prior to the products' sale or distribution to the public.[74] The plaintiffs claimed that the EPA's registration of three strychnine pesticides violated the ESA's endangered species protection provisions.[75] The defendants argued that the plaintiffs' registration challenges could only be brought pursuant to FIFRA, and thus, they had no independent

67. *See id.* (setting forth statutory provisions at issue).

68. *See id.* at 714-15 (explaining Conservation Law Foundation's claims that Secretary's actions threatened loss of ESA protections).

69. *See id.* (describing effect of not requiring Secretary to consider ESA section 7(d) limitation on commitment of resources).

70. *See id.* (explaining Secretary will not take action under OSCLA unless certain that action will not jeopardize endangered species as required under ESA).

71. *See Conservation Law Foundation*, 623 F.2d at 714-15 (explaining reasoning was analogous to fundamental rule of contract law providing that contracts will not be interpreted in such manner as would make them illegal).

72. *See Defenders of Wildlife v. Administrator*, 882 F.2d 1294, 1299 (8th Cir. 1989) (relying on *Conservation Law Foundation* court's reasoning that ESA obligations applied to Secretary's actions taken under authority of FIFRA).

73. *See id.* at 1296 (describing parties and reason for lawsuit).

74. *See id.* (explaining FIFRA gives EPA authority to approve pesticide registration applications when normal use of pesticide will not result in harmful environmental effects).

75. *See id.* at 1298, 1300 (describing plaintiffs' ESA challenges to EPA registration decisions).

cause of action under the ESA.[76] Analyzing the applicability of the ESA to the EPA's authority to regulate pesticides pursuant to FIFRA, the Eighth Circuit held that acting under FIFRA did not exempt the EPA from complying with the ESA requirements during the pesticide registration process.[77] Like the First Circuit in *Conservation Law Foundation*, the Eighth Circuit determined that the EPA must comply with ESA endangered species protection provisions before acting on its authority under a separate statute.[78]

2. *Restrictive View of Agency Authority Under ESA*

In contrast to these broad interpretations of agency authority under the ESA, the Fifth Circuit found that the EPA lacked authority to take action pursuant to the ESA when the CWA did not explicitly provide that authority.[79] In *American Forest*, the plaintiff claimed that the EPA lacked authority to deny the issuance of a pollution permit granted by the State of Louisiana.[80] The EPA had previously approved Louisiana's CWA application for the transfer of administrative control over pollution permit issuance, but the EPA retained the right to veto any permits that the FWS and NMFS classified as a threat to endangered species.[81] Interpreting the EPA's power to transfer permitting authority under the CWA as a non-discretionary action that "does not enjoy wide latitude," the Fifth Circuit held that the EPA lacked the statutory authority to impose ESA restrictions when a state otherwise satisfied the nine criteria enumerated in the CWA.[82]

In the D.C. Circuit's *Platte River* decision, the Platte River Whooping Crane Critical Habitat Maintenance Trust (Trust) re-

76. *See id.* at 1298-99 (noting defendants' main contention in response to plaintiffs' arguments).

77. *See Defenders of Wildlife v. Administrator*, 882 F.2d at 1299 (explaining agencies must comply with ESA requirements even when acting pursuant to another statute).

78. *See id.* (finding EPA must consider environmental effects of pesticides prior to registration under FIFRA).

79. *See Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 293-94, 297 (5th Cir. 1998) (holding EPA's duty under CWA was non-discretionary).

80. *See id.* at 294, 296 (noting plaintiff's claim that EPA's retention of right to revoke state-issued permits exceeded its statutory authority and would result in excessive costs to plaintiff).

81. *See id.* at 293-94 (describing EPA's conditioned approval of Louisiana's transfer application).

82. *See id.* at 294, 297 (citing its decision in *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1285 and n.3 (5th Cir. 1977)). The court in *Save the Bay* held that the CWA listed the requirements a state program must meet to obtain approval and "[u]nless the Administrator of EPA determines that the proposed state program does not meet these requirements, he must approve the proposal." *See id.*

quested that the Federal Energy Regulatory Commission (FERC) consider the need for wildlife protection before issuing licenses to the Trust for the operation of hydroelectric projects pursuant to its authority under the Federal Power Act (FPA).[83] The Trust relied on ESA section 7 to support its claim that the FERC was required to do "whatever it takes" to protect the threatened and endangered species that populated the Platte River basin area.[84] The D.C. Circuit found the Trust's interpretation of the ESA to be "far-fetched" and emphasized that the statute did not enlarge the agency's authority granted under its enabling act.[85] The court denied the Trust's petition to review the FERC's issuance of licenses for hydroelectric projects based on its conclusion that the FERC had violated ESA section 7.[86]

D. Ninth Circuit Precedent Interpreting the Scope of Agency Authority Under ESA

The Ninth Circuit had not previously addressed the precise issue presented in *Defenders of Wildlife*, but it has interpreted the statutory and regulatory language involved in the case.[87] In *Washington Toxics Coalition v. EPA* (*Washington Toxics*),[88] the plaintiffs claimed that the EPA failed to consult the NMFS concerning the potentially harmful effects of pesticides registered by the EPA under FIFRA.[89] The EPA contended that its authority to rescind pesticide registrations lay in FIFRA, not the ESA.[90] Relying on the Eighth Circuit's reasoning in *Defenders of Wildlife v. Administrator*, the Ninth Circuit held that the EPA must comply with the ESA in conjunction with its

83. *See Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 30 (D.C. Cir. 1992) (noting environmental groups' claim that FERC's interpretation of its authority was "insufficiently aggressive or imaginative").

84. *See id.* at 34 (explaining Trust's position that any limitations of authority under FPA were "implicitly superseded" by provisions of ESA's section 7).

85. *See id.* (explaining court's rejection of Trust's statutory interpretation). The D.C. Circuit additionally noted that its holding in *Platte River* did not contradict the Supreme Court's holding in *Tennessee Valley*, which did not rule on the issue of whether section 7 permits agencies to exceed statutory authority to serve ESA objectives. *See id.*

86. *See id.* (denying plaintiffs' petition for review and noting that *Tennessee Valley* did not stand as contrary precedent).

87. For a discussion of the Ninth Circuit's interpretation of the ESA and corresponding regulations in prior court precedent, see *infra* notes 88-92 and accompanying text.

88. 413 F.3d 1024 (9th Cir. 2005).

89. *See id.* at 1030 (alleging violations of ESA section 7(a)(2)).

90. *See id.* (explaining EPA's argument that it lacked authority to rescind pesticide registrations).

registration of pesticides pursuant to FIFRA.[91] In reaching this decision, the court rejected the EPA's argument that it had no legal authority to act under the ESA once it had registered pesticides pursuant to FIFRA framework because the EPA retained an "ongoing regulatory authority" over pesticide registrations.[92]

IV. NARRATIVE ANALYSIS

A. Review of the Legal Basis for the EPA's Approval of Arizona's Transfer Application

In reviewing the EPA's decision under the arbitrary and capricious standard, the Ninth Circuit analyzed whether the EPA relied on coherent, internally consistent and well-explained reasoning when reaching its conclusion.[93] Applying this test, the court found the EPA relied on legally contradictory positions concerning its ESA section 7 responsibilities.[94]

The EPA first asserted that it must, in compliance with its ESA duties, engage in the consultation process prior to making permitting authority transfer decisions.[95] During the course of its decision-making process, the EPA noted that ESA section 7(a)(2) required consultation with the FWS to determine any possible threat to endangered species that could arise from approval of Arizona's state permitting program application.[96] The EPA's second assertion, however, suggested that the agency was prohibited under federal law from considering the potential harmful effects to endangered species caused by the transfer of permitting authority.[97] The EPA relied on the Biological Opinion in deciding to approve

91. *See id.* at 1032 (explaining reasoning for holding that EPA must comply with ESA when acting under FIFRA authority).

92. *See id.* at 1033 (describing EPA's misplaced reliance on cases where agency authority and obligation ended because activity did not require "ongoing regulatory authority").

93. *See Defenders of Wildlife v. EPA*, 420 F.3d 946, 959 (9th Cir. 2005) (examining consistency and coherency of EPA's reasoning). To withstand arbitrary and capricious review, an agency decision must be "rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." *See id.* An agency action will be deemed arbitrary and capricious if it is inconsistent with the agency's governing statute or if the agency's decision-making process involved internally contradictory reasoning. *See id.*

94. *See id.* (finding EPA's decision was based on inconsistent reasoning).

95. *See id.* at 961 (explaining "the two propositions that underlie the EPA's action").

96. *See id.* at 959-60 (citing Memorandum of Agreement as well as FWS and EPA notices stating that consultation about potential effects on endangered species was required before approving application).

97. *See id.* at 960-61 (noting Biological Opinion's conclusion that EPA lacked authority to deny transfer applications based on potential harm to endangered

Arizona's application.[98] This Opinion contended that the EPA had no legal authority to base its consideration of the application on the results of the FWS consultation.[99] The Ninth Circuit concluded that the EPA's decision-making process involved contradictory views of the same language in ESA section 7(a)(2), and consequently, the EPA's decision was not based on reasoned decision-making.[100]

The Ninth Circuit also found the Biological Opinion's lack of direct causation analysis unconvincing because it failed to consider that certain events result from multiple causes.[101] In its analysis, the Opinion reasoned that private development resulting from the transfer decision, rather than the decision itself, would affect endangered species.[102] Concluding that the two actions together—the EPA's approval of Arizona's transfer application and private development decisions—represented a potential threat to endangered species, the court held that the Opinion's lack of causation analysis did not meet the reasoned decision-making standard.[103]

B. Statutory Authority Provided by ESA Section 7

The Ninth Circuit next decided whether ESA section 7 obliges agencies to insure that all federal actions are not likely to jeopardize endangered species.[104] In rejecting the EPA's arguments, the court determined that the loss of potential benefits arising from compulsory consultation should have been included in the Biological Opinion as an "indirect effect" of the transfer approval.[105] Because it construed the EPA's transfer decision as a cause of the loss

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species, which conflicted with EPA's assertion that it needed to conduct ESA section 7 endangered species consultations prior to making transfer decision).

98. *See Defenders of Wildlife*, 420 F.3d at 961 (discussing EPA's reliance on Biological Opinion's reasoning).

99. *See id.* at 961 (explaining Biological Opinion's suggestion that scope of EPA's authority in making its decision was limited).

100. *See id.* (finding EPA relied on inconsistent reasoning in making transfer decision).

101. *See id.* (asserting several events in causal chain lead to ultimate event).

102. *See id.* (explaining Biological Opinion's lack of causation argument).

103. *See Defenders of Wildlife*, 420 F.3d at 962 (recognizing events can have multiple causes). The court concluded that "the two sets of decisions *together*—the private development decisions and the governmental transfer decision—but not either one independently, have the potential to affect listed species and their habitat." *See id.*

104. *See id.* at 962 (determining issue of statutory power to protect species).

105. *See id.* at 962-63 (quoting 40 C.F.R. pt. 1508.8 (2005)). The regulation defines indirect effects as those "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *See id.*

of consultation benefits, the court concluded that the EPA should have considered this effect when making the transfer decision.[106]

The Ninth Circuit next concluded that, based on the Supreme Court's decision in *Tennessee Valley*, an agency's duty to "insure" that its actions prevent the likelihood of harm to endangered species was a duty "in addition to those created by the agencies' own governing statute."[107] In reaching this conclusion, the Ninth Circuit discussed the Supreme Court's analysis in *Tennessee Valley*, which asserted that the ESA's legislative history supported the position that an agency must act to protect endangered species to the fullest extent "consistent with [the agency's] purpose."[108] The Ninth Circuit further concluded that ESA Amendments passed in 1978 did not alter *Tennessee Valley*'s interpretation of an agency's duty to give precedence to the protection of endangered species.[109]

The Ninth Circuit then considered whether the EPA's decision to transfer pollution permitting authority to Arizona was the kind of agency action that triggered the ESA's consultation obligation.[110] In deciding this issue, the Ninth Circuit rejected the same argument by Arizona and the Chamber of Commerce that because the CWA specifies the EPA "shall approve" state applications which satisfy nine enumerated criteria, the EPA lacks discretion to consider impacts on endangered species when making its decision.[111]

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106. *See id.* at 962-63 (explaining when requisite nexus between agency action and action's impact on endangered species is present). The court describes a nexus as existing when "a negative impact on listed species is the likely direct or indirect effect of an agency's action only if the agency has some control over that result." *See id.*

107. *See id.* at 964-67 (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978)) (identifying *Tennessee Valley* decision as Court's seminal section 7 case and describing its interpretation of ESA as granting broad authority to agencies for ensuring protection of endangered species).

108. *See Defenders of Wildlife*, 420 F.3d at 964-65 (discussing Supreme Court's analysis of ESA legislative history in *Tennessee Valley* decision).

109. *See id.* at 966 (quoting H.R.REP.No. 95-1625, at 10 (1978)) (discussing Congress's understanding of *Tennessee Valley*'s holding). The court quoted the House Report's statement of Congress's interpretation of *Tennessee Valley* as finding that "[t]he pointed omission of any type of qualifying language in the statute revealed congressional intent to give the *continued existence of endangered species priority over the primary missions of federal agencies.*" *See id.* (emphasis added by court in *Defenders of Wildlife*).

110. *See id.* at 967 (addressing whether EPA's transfer decision was action "authorized, funded, or carried out" by agency as set forth in ESA).

111. *See id.* (quoting *Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1032 (9th Cir. 2005)) (citing holding that agency cannot ignore duty to comply with ESA simply based on its obligation under another statute with complementary objectives).

The court rejected this argument for two reasons.[112] First, the EPA did not assert an argument that its transfer decision was not "discretionary" within the provisions of chapter 50, section 402.03 of the Code of Federal Regulations, which governs the CWA.[113] Because the court customarily defers to an agency's interpretation of its regulation, and here, the EPA did not interpret this action as non-discretionary within the meaning of the regulation, the court would not construe it as such.[114]

Second, the Ninth Circuit found that cases applying section 402.03 were consistent with its interpretation of the regulation's reference to "discretionary . . . involvement" as having the same meaning as the ESA's reference to actions "authorized, funded, or carried out" by the agency.[115] The Ninth Circuit relied on *Washington Toxics*, holding that ESA section 7 was inapplicable in discretionary involvement or control cases if the agency had "no ongoing regulatory authority" over the decision-making process.[116] The Ninth Circuit thus concluded that because the EPA exercised exclusive, ongoing authority over the decision to approve Arizona's permitting program application, ESA section 7 obligations applied.[117]

Summarizing its conclusions, the Ninth Circuit held that the EPA's approval of Arizona's permitting program application was an "authorized" agency action which triggered ESA section 7(a)(2) requirements prohibiting agencies from taking actions that would threaten or jeopardize endangered species.[118] Furthermore, the court found the Biological Opinion improperly disregarded the potentially harmful indirect effect that the loss of ESA section 7 con-

112. For a discussion of the Ninth Circuit's reasoning in rejecting the argument that the EPA lacked authority to deny Arizona's transfer application, see *infra* notes 113-17 and accompanying text.

113. *See Defenders of Wildlife*, 420 F.3d at 968 (explaining first reason for rejecting argument that CWA criteria preclude application of ESA section 7 consultation requirements).

114. *See id.* (explaining reason for not interpreting transfer decision as non-discretionary within meaning of governing regulation).

115. *See id.* at 968 (noting second reason for dismissing argument that CWA precludes EPA from exercising discretion over transfer decisions). The court also explained the second reason in different words, stating that "imposing section 7(a)(2)'s substantive requirements in those cases would have gone beyond the limited command of the statute." *See id.*

116. *See id.* (explaining agency was not responsible for actions taken when it no longer had authority).

117. *See id.* at 969 (finding EPA's transfer decision triggered ESA section 7 duties). Because the EPA held complete control over the decision to authorize the transfer of pollution permitting authority, section 7 consultation provisions were required. *See id.*

118. *See Defenders of Wildlife*, 420 F.3d at 971 (finding compliance with "complementary" statute like CWA did not release EPA from ESA duties).

sultation benefits could have on endangered species.[119] The court found that the failure to include this data rendered the Biological Opinion deficient, and the EPA erred in relying on this deficient Opinion when approving the transfer.[120] Finding the EPA's action to be legally flawed, the court vacated the EPA's decision to approve Arizona's pollution permitting application.[121]

In addressing the circuit split concerning the scope of the EPA's power under the provisions of the ESA, the Ninth Circuit found the D.C. Circuit and Fifth Circuit decisions unpersuasive in its resolution of the questions presented.[122] The Ninth Circuit found that the D.C. Circuit in *Platte River* failed to properly distinguish between the language and purpose of ESA sections 7(a)(1) and 7(a)(2), including the significance of the word "insure" in section 7(a)(2).[123] Similarly, the Ninth Circuit reasoned that the Fifth Circuit's decision in *American Forest* improperly relied on *Platte River*'s conclusion that ESA section 7(a)(2) did not authorize the EPA to consult with the FWS prior to transferring permitting authority.[124] Additionally, the Ninth Circuit in *Defenders of Wildlife* disagreed with the Fifth Circuit's interpretation that the ESA's "consultation and assurance aspects" constituted independent duties.[125] Consequently, the Ninth Circuit concluded that the First Circuit's *Conservation Law Foundation* decision and the Eighth Circuit's *Defenders of Wildlife v. Administrator* decision provided the "better reasoned" support for its holding that the ESA gives EPA authority to base its pollution permitting program applications on the consideration of potential impacts to endangered species.[126]

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119. *See id.* (explaining EPA transfer decision is cause of harmful impacts that flow from development of subsequent water projects).

120. *See id.* (noting Biological Opinion ignored indirect effects but acknowledged that section 7 consultations had saved species' critical habitats in prior situations).

121. *See id.* at 979 (remanding petition to EPA for proceedings consistent with Ninth Circuit's *Defenders of Wildlife* opinion).

122. *See id.* at 970 (discussing holdings and reasoning of other circuits).

123. *See Defenders of Wildlife*, 420 F.3d at 970 (explaining deficiencies in D.C. Circuit's *Platte River* decision). The court additionally noted that the D.C. Circuit failed to consider the ESA's legislative history, which indicates a clear congressional intent to avoid approving amendments that would limit the authority granted under the ESA. *See id.* at 970-71.

124. *See id.* at 971 (finding reliance on *Platte River* reasoning was faulty).

125. *See id.* (finding Fifth Circuit's reasoning to be incorrect).

126. *See id.* at 970-71 (concluding that First and Eighth Circuits as well as Ninth Circuit precedent provided more reasoned foundation for holding in *Defenders of Wildlife*).

C. Dissenting Opinion

Senior Circuit Judge Thompson dissented in *Defenders of Wildlife* because he disagreed with the majority's conclusion that the EPA held the authority to give weight to the effects on endangered species and critical habitats when considering a state's pollution permitting program transfer application.[127] In support of this position, the dissent noted that Ninth Circuit precedent held that an agency had no discretion to take action when the agency lacked the authority to act for the benefit of endangered species.[128] Additionally, the dissent found the majority's interpretation of the ESA regulations defining discretionary actions too expansive.[129] The dissent argued that the majority misconstrued the "discretionary involvement" provision when it found that language to encompass any action that falls within an agency's decision-making power.[130] This interpretation of the regulatory language contradicted Ninth Circuit precedent, which, the dissent maintained, held that an agency could have decision-making authority in certain cases but still not have the power, either independently or in connection with a separate authority, to act on behalf of endangered species under ESA section 7.[131]

The dissent also argued that the CWA's language restricted the EPA's authority to consider only the nine criteria listed in the statute when reviewing transfer applications.[132] Because Congress established this closed list of nine criteria, the dissent concluded that the statute did not allow the EPA to require states to meet additional conditions.[133] The CWA's language did not give the EPA discretion to deny an application that met the specified criteria, and

127. *See id.* at 979 (Thompson, J., dissenting) (explaining reasons for disagreement with majority opinion).

128. *See Defenders of Wildlife*, 420 F.3d at 979 (Thompson, J., dissenting) (citing Ninth Circuit cases limiting agency discretion to act on behalf of endangered species).

129. *See id.* (Thompson, J., dissenting) (finding Ninth Circuit precedent did not interpret "discretionary involvement" as broadly as majority opinion).

130. *See id.* (Thompson, J., dissenting) (explaining majority opinion's broad interpretation of section 402.03's "discretionary involvement" language).

131. *See id.* at 979-80 (Thompson, J., dissenting) (listing Ninth Circuit cases where agencies lacked discretionary authority to act and engaged in section 7 consultation).

132. *See id.* at 980 (Thompson, J., dissenting) (highlighting CWA language stating that EPA "shall approve" state permitting program application if it meets nine enumerated criteria).

133. *See Defenders of Wildlife*, 420 F.3d at 980 (Thompson, J., dissenting) (agreeing agencies must comply with ESA section 7 consultation when acting under separate, complementary statute but making distinction that CWA has only nine "exclusive" criteria).

thus, its decision did not constitute an "agency action" requiring ESA section 7 obligations.[134]

V. CRITICAL ANALYSIS

In interpreting the ESA section 7 provisions as applicable to the EPA's decision-making capacities under the CWA, the Ninth Circuit improperly expanded the EPA's authority when considering approval of state pollution permitting program applications.[135] Because the CWA explicitly defines the exclusive requirements that the state must meet for EPA approval of state pollution permitting programs, the Ninth Circuit erred in broadly construing the EPA's authority to deny state applications based on outside factors such as the potential harm to endangered species.[136]

The Ninth Circuit's holding that the EPA must engage in ESA section 7 endangered species consultation when assessing state permitting applications is inconsistent with the EPA's statutory duty under the plain language of the CWA and the CWA's explicit purpose.[137] The language of the CWA does not provide the EPA with absolute discretion over the approval of a state's pollution permitting program application.[138] Instead, the statute authorizes the EPA to consider a list of nine criteria when determining whether to transfer permitting authority to the states.[139] Pursuant to the language of the CWA, if the state meets these requirements, the EPA Administrator "shall approve" the proposed permitting program.[140] This statutory language does not permit the EPA to consider outside factors when making transfer decisions.[141] Congress's use

134. *See id.* (Thompson, J., dissenting) (finding transfer decision did not qualify as "agency action" sufficient to prompt ESA section 7 consultation requirements).

135. *See id.* (Thompson, J., dissenting) (reasoning EPA lacked discretionary authority to consider endangered species effects when evaluating Arizona's pollution permitting program application).

136. *See id.* (Thompson, J., dissenting) (emphasizing CWA permits EPA to consider only nine enumerated criteria).

137. *See id.* (Thompson, J., dissenting) (noting imposition of ESA section 7 consultation in transfer decision would be inconsistent with statutory language and CWA objectives).

138. *See Defenders of Wildlife*, 420 F.3d at 980 (Thompson, J., dissenting) (finding EPA lacked discretionary authority to act pursuant to ESA section 7).

139. *See id.* (Thompson, J., dissenting) (emphasizing language of CWA limiting EPA to consideration of only nine criteria set forth in statute).

140. *See* 33 U.S.C. § 1342(b) (listing criteria states must meet for permit program approval).

141. *See Defenders of Wildlife*, 420 F.3d at 980 (Thompson, J., dissenting) (stating "Congressional directive [in CWA section 1342(b)] does not permit EPA to impose additional conditions"). *See also Am. Forest & Paper Ass'n v. EPA*, 137 F.3d

of the word "shall" in drafting the CWA indicates that the EPA's authority to grant transfer applications is compulsory, rather than discretionary, if the nine exclusive criteria are satisfied.[142] In expanding the EPA's authority beyond the scope of the CWA's provisions, the Ninth Circuit's interpretation fails to satisfy Congress's intent to give states and local enforcement a primary role in the regulation of water pollution.[143]

Furthermore, the Ninth Circuit's broad construction of the regulatory language defining the scope of discretionary actions requiring ESA section 7 compliance did not properly apply to the circumstances in *Defenders of Wildlife*.[144] The majority broadly interpreted ESA regulatory section 402.03's "discretionary involvement" language to mean that any action involving an agency's decision-making authority necessarily invoked ESA section 7 requirements.[145] Because the CWA provides the EPA no discretion to act on behalf of endangered species when evaluating Arizona's pollution permitting program application, the Ninth Circuit incorrectly

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291, 297 (5th Cir. 1998) (holding CWA language is "firm" on issue of EPA's authority to approve program applications unless they do not satisfy all nine enumerated criteria).

142. *See* William C. Ellis, Note, *May the EPA Condition Approval of State Proposals for Administering the NPDES on Adherence to Criteria Not Enumerated in the Clean Water Act?*, 7 MO. ENVTL. L. & POL'Y REV. 93, 98 (2000) (recognizing CWA statutory language makes EPA approval decisions mandatory if nine criteria are met).

143. *See* Elizabeth Evensen, *Fifth Circuit Rejects EPA Rule Requiring State and Federal Agency Consultation as a Precondition for State Permitting Programs*, 19 J. LAND RESOURCES & ENVTL. L. 129, 130 n.10 (1999) (quoting 33 U.S.C. § 1251(b)). Section 1251(b) provides that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources . . . ." *See id. See also Defenders of Wildlife*, 420 F.3d at 980-81 (Thompson, J., dissenting) (quoting CWA section 1251(b) language cited above and noting additional statutory language providing "that the States will manage . . . and implement" NPDES pollution permitting program).

144. *See Defenders of Wildlife*, 420 F.3d at 979-80 (Thompson, J., dissenting) (noting EPA lacked discretion to reject Arizona's transfer application).

145. *See id.* at 979 (Thompson, J., dissenting) (disagreeing with majority's expansive interpretation of ESA regulatory language). The dissent noted that this broad interpretation contradicted other Ninth Circuit precedent concerning that regulatory language, which has repeatedly acknowledged that an agency may have decision-making authority but still lack the discretionary power to act on behalf of endangered species. *See id.* at 979-80. In support of this contention, the dissent cited several cases, including Marbled Murrelet v. Babbitt, 83 F.3d 1068 (9th Cir. 1996) and Sierra Club v. Babbitt, 65 F.3d 1502 (9th Cir. 1995), to demonstrate that certain authorized agency actions do not fall within the meaning of "discretionary involvement" as needed to invoke ESA section 7 requirements. *See id.*

concluded that ESA section 7 provided such discretionary authority.[146]

For the reasons outlined above, the Ninth Circuit's reliance on its *Washington Toxics* decision was misplaced.[147] In that case, the Ninth Circuit held that ESA section 7 requirements applied when an agency maintained "ongoing discretion" over the regulation of pesticide registrations.[148] Thus, the EPA continued to have the duty to act on behalf of endangered species throughout the life of the pesticide registration, and these ongoing ESA section 7 obligations authorized the EPA to modify registrations in response to endangered species concerns.[149] By contrast, because the CWA does not provide the EPA with discretionary authority to deny state pollution permitting programs that meet CWA's nine enumerated criteria, ESA section 7 requirements did not apply in *Defenders of Wildlife*.[150]

Additionally, the Ninth Circuit's holding in *Defenders of Wildlife* departs from other circuit courts' more recent holdings.[151] The D.C. Circuit and Fifth Circuit both addressed the authority and duty of an agency under ESA section 7 in connection with the agency's responsibility under a separate statute.[152] In *Platte River*, the D.C. Circuit emphasized that the ESA "does not *expand* the powers" given to an agency by its enabling act.[153] The D.C. Circuit disagreed with the plaintiff Trust's argument that ESA section 7

146. *See id.* at 979 (Thompson, J., dissenting) (quoting *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998)) (reasoning that ESA does not apply to non-discretionary agency actions).

147. *See id.* at 980 (Thompson, J., dissenting) (citing *Washington Toxics* decision as support for majority's interpretation of Code of Federal Regulations section 402.03's discretionary involvement language).

148. *See Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1033 (9th Cir. 2005) (finding EPA had "continuing obligation" to consider potential harm to endangered species when acting under its FIFRA authority to register pesticides).

149. *See id.* (explaining FIFRA provisions do not limit EPA's regulatory duty under ESA).

150. *See Defenders of Wildlife*, 420 F.3d at 980 (Thompson, J., dissenting) (noting EPA had obligation only to consider state program's ability to satisfy nine specified CWA criteria).

151. *See id.* at 969-70 (noting circuit split concerning whether ESA grants EPA authority beyond that granted by other statutes to protect endangered species).

152. For a discussion of the holdings of the D.C. and Fifth Circuit decisions addressing the EPA's authority under the ESA, see *infra* notes 153-57 and accompanying text.

153. *See Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) (emphasis in original) (finding plaintiff's broad interpretation of agency authority under ESA to be "far-fetched").

required the FERC to do "whatever it takes" to protect endangered species.[154]

Similarly, the Fifth Circuit in *American Forest* also examined the scope of the EPA's ESA authority and asserted that the EPA "cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the CWA."[155] The *American Forest* court further noted that Congress could have, but did not, include a CWA provision explicitly protecting endangered species as it did in CWA section 1342(b)(6), which gives EPA authority to veto proposed state permit programs that negatively affect navigation.[156] Congress's inclusion of a provision addressing navigation concerns as one of the nine enumerated CWA criteria indicates that Congress clearly considered the practical effects of state permitting authority but did not incorporate an endangered species protection provision among the CWA's specified state program requirements.[157] As these circuit courts have held, the EPA is authorized to consider state pollution permitting program applications based on the consideration of "nine *exclusive* requirements," which do not include an endangered species protective measure.[158] The Ninth Circuit has thus departed from the holdings of other recent circuit court decisions and effectively enlarged the authority of the EPA beyond the boundaries established by the CWA.[159]

In concluding the EPA had the authority to consider potential harm to endangered species when evaluating Arizona's CWA permitting program application, the Ninth Circuit incorrectly decided *Defenders of Wildlife* and erroneously vacated the EPA's transfer deci-

154. *See id.* (disagreeing with plaintiff's argument concerning scope of EPA authority under ESA section 7).

155. *See Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998) (holding EPA's authority regarding state permit programs under CWA was nondiscretionary).

156. *See* Laurie K. Beale & Beth S. Ginsberg, *Clean Water Act and Endangered Species Act Interface: A Practical Analysis*, SH041 A.L.I.-A.B.A. 191, 200 (Oct. 23-25, 2002) (explaining Fifth Circuit's reasoning that Congress could have, but did not, expand CWA permit program requirements to include endangered species protection). *See also American Forest*, 137 F.3d at 297-98 (finding EPA's claim that CWA provides minimum rather than exhaustive criteria was "further weakened" by CWA provision requiring denial of permits that would disrupt navigation channels).

157. *See American Forest*, 137 F.3d at 297-98 (emphasizing Congress's ability to include in CWA endangered species protection provision similar to currently enumerated navigation protection provision).

158. *See Defenders of Wildlife v. EPA*, 420 F.3d 946, 980 (9th Cir. 2005) (Thompson, J., dissenting) (describing EPA's authority to approve state transfer applications as confined to evaluation of state's ability to meet nine specified CWA requirements).

159. *See id.* at 970-71 (concluding First and Eighth Circuits provided "better reasoned out-of-circuit authority" than Fifth and D.C. Circuits).

sion.[160] Because the CWA does not contain language establishing that the EPA may exercise discretion when deciding whether to approve state pollution permitting program applications that meet the CWA's nine enumerated criteria, the EPA lacked authority to deny Arizona's application based on the transfer's potential harm to endangered species.[161]

VI. IMPACT

The Ninth Circuit's decision in *Defenders of Wildlife* expands the scope of the EPA's control over approving transfers of pollution permitting authority to the states.[162] In extending this authority, the EPA will have greater power to deny permits based on criteria that fall outside the nine conditions enumerated in the CWA.[163] This affirmative application of the ESA to the EPA's decision to approve CWA permit program transfers may have the positive effect of increasing environmental protection and fostering better preservation of natural resources.[164] Because the Ninth Circuit's decision effectively returns pollution permitting authority to the federal government, the EPA's fulfillment of its ESA section 7 agency obligations may specifically engender greater endangered species protection.[165]

In broadly construing the EPA's authority to act under the ESA, the Ninth Circuit retreated from the Fifth Circuit's more narrow construction of the statute, which favored industry and state sovereignty over environmental interests.[166] Because the Ninth Circuit's decision recognized the EPA's authority to impose endan-

160. *See id.* at 979 (Thompson, J., dissenting) (noting disagreement with majority's conclusion that EPA had authority to consider endangered species impacts related to approval of Arizona's pollution permitting program application).

161. *See* Ellis, *supra* note 142, at 103 (acknowledging Fifth Circuit correctly decided *American Forest* because CWA language did not indicate that nine enumerated criteria were minimum guidelines).

162. *See Defenders of Wildlife*, 420 F.3d at 971 (concluding ESA section 7(a)(2) conferred obligation on EPA to ensure that transfer decision did not negatively impact endangered species).

163. *See id.* at 980-81 (Thompson, J., dissenting) (noting majority incorrectly interpreted EPA's authority as discretionary).

164. *See* Mary Jo Pitzl, *U.S. To Get Reins of Clean-Water Program; EPA Erred in Giving Arizona Control of Regulating Pollution Discharges*, THE ARIZONA REPUBLIC, Aug. 25, 2005, at 6B (noting Ninth Circuit decision could benefit endangered species).

165. *See id.* (observing that federal control over pollution permit issuance could result in additional endangered species protection). For a discussion of the absence of state obligation to comply with ESA section 7 consultation requirements, see *supra* notes 51-52 and accompanying text.

166. *See* Ellis, *supra* note 142, at 103 (noting Fifth Circuit's *American Forest* decision "struck a blow for industry").

gered species protection conditions that are not specifically enumerated in the CWA, industrial organizations seeking polluting rights may encounter a more complicated, time-consuming and comprehensive permit approval process.[167] Additionally, this decision may affect the uniformity of state program transfer decisions because the requirements for approval will not necessarily be confined to the criteria provided in the statute and could be based on various other factors.[168] In making the state program approval process more difficult, the Ninth Circuit's decision represents a potential limit on state assumption of pollution permitting authority, which contravenes the congressional intent underlying the CWA's enactment.[169]

The debate concerning the scope of the EPA's ESA endangered species protection obligations when acting pursuant to its authority under separate governing statutes, like the CWA, has created a circuit split.[170] The Ninth Circuit's *Defenders of Wildlife* decision, which is the latest case to address the issue, represents a broad interpretation of the EPA's statutory authority under the ESA. Due to conflict among the circuits, the Supreme Court may need to intervene to establish the extent of the EPA's authority under ESA section 7.[171] The Ninth Circuit's *Defenders of Wildlife* decision further indicates the potential need for Congress to reconsider the current CWA provisions for state permitting programs and draft statutory language clarifying whether the nine enumerated criteria are comprehensive or open-ended requirements.[172] In taking a position contrary to other circuits, the Ninth Circuit's *Defenders of Wildlife* decision makes clear that for purposes of national uniformity with respect to the EPA's authority as a federal agency,

167. *See* Evensen, *supra* 143, at 144 (noting Fifth Circuit's *American Forest* decision would be beneficial for industry because permit approval process would not be "unnecessarily prolonged and complicated"). *See also* Pitzl, *supra* note 164, at 6B (observing Ninth Circuit's decision "could affect development statewide").

168. *See* Ellis, *supra* 142, at 102 (observing Fifth Circuit's *American Forest* decision could result in uniform state program application approvals because decisions would necessarily be based on set criteria listed in CWA).

169. For a discussion of Congress's intent to give states a primary role in the regulation of water pollution, see *supra* note 143 and accompanying text.

170. For a discussion of the conflicting positions of the circuit courts concerning the scope of the EPA's ESA obligations, see *supra* notes 58-86 and accompanying text.

171. *See* Evensen, *supra* note 143, at 143 (suggesting need for Supreme Court clarification of ESA section 7 authority following Fifth Circuit's *American Forest* decision).

172. *See* Ellis, *supra* note 142, at 103 (noting controversy in *American Forest* could have been avoided if Congress indicated whether CWA provisions were exhaustive or discretionary).

Supreme Court review or congressional action will likely be necessary to resolve the statutory conflict.

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